1-31-2017

Dunn v. Idaho State Tax Com'n Respondent's Brief Dckt. 44378

IN THE SUPREME COURT OF THE STATE OF IDAHO

LINDA DUNN,

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Respondent.

Supreme Court Docket No. 44378
District Court No. CV-2015-3329

RESPONDENT IDAHO STATE TAX COMMISSION'S BRIEF

Appeal from the First District Court, Kootenai County, State of Idaho
Honorable District Judge Cynthia K.C. Meyer, presiding.

Lawrence G. Wasden
Attorney General
David B. Young, ISB No. 6380
Phil N Skinner, ISB No. 8527
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722-0410

Attorneys for Respondent

Robert E. Kovacevich
Admitted in Idaho pro hac vice
818 W. Riverside Ave., No. 525
Spokane, Washington 99201

Richard W. Kochansky, ISB No. 2435
408 E. Sherman, Suite 309
Coeur d'Alene, Idaho 83814

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

Cases: **Page**

(cont.)

Statutes and Rules: **Page**

Secondary Authorities:

STATEMENT OF THE CASE

I. Nature of the case

This is a straightforward case. It involves an Idaho resident's personal income tax liability. This is a tax case, yes, but the issues involve relatively uncomplicated non-tax matters.

The Idaho resident in question is the Appellant, Linda Dunn. This case revolves around her community property interest in the wages earned by her husband, Barry Dunn.

Although married, Linda and Barry Dunn lived apart during the years in question. Barry Dunn was never an Idaho resident during the years at issue, and he earned his wages out-of-state. The taxable income in question in this case was earned in two states, Texas and Washington. Both of these states are governed by community property laws.

As a point of emphasis, we note that this case is *not* about taxing Barry Dunn or his income. Rather, this case is about Linda Dunn, and her requirement to report her community property interest in the income her husband made. Under Idaho law, Linda Dunn is required to pay tax on the income she received from her one-half interest in her husband's wages.

The Appellant's Brief argues two main points that Linda Dunn should not have to report any taxable interest in her husband's income:

First, the Appellant's Brief argues that it is unconstitutional to tax Linda Dunn based on her husband's out-of-state earnings. But there is no serious issue here, because primary legal authority shows that there are no constitutional problems with Idaho's taxation of Linda Dunn's community property income. The controlling law clearly requires Linda Dunn to report and pay tax on the community income, even if the source of the income comes from out-of-state.

Second, in the alternative, the Appellant's Brief asserts that the wages are not actually community property under Texas law. But a quick review of Texas law leads to the conclusion that Barry Dunn's wages are actually community property.

After reflection, it becomes clear that the legal arguments in Appellant's Brief all seem to rest on one premise: that Idaho is illegally attempting to tax Barry Dunn himself, a non-resident. But that premise is flatly incorrect; Idaho is not taxing Barry Dunn or his portion of community income, but is taxing the interest that Linda Dunn alone has in her community income. The distinction is clear: Idaho is attributing income Barry Dunn earned to Linda Dunn. Idaho is not taxing Barry Dunn or his income. Since Idaho is not taxing Barry Dunn's portion of the community income, then the legal arguments in Appellant's Brief fail.

In the end, as the District Court held, Linda Dunn had a vested one-half interest in the wages earned by Barry Dunn in Texas and Washington during the years in question. Linda Dunn is an Idaho resident, and is subject to taxation in Idaho on her community income.

The District Court should be affirmed.

II. Course of Proceedings

The Idaho State Tax Commission (Commission) issued a deficiency against Linda Dunn's one-half community property interest in Barry Dunn's wages for the taxable years. R., p. 115. The Decision entered by the Commission was only addressed to Linda Dunn and was concerned only with income attributed to her. R., p. 115.

Linda Dunn filed an appeal to the Idaho Board of Tax Appeals, and the Board affirmed the Commission's Decision. R., pp. 17-25. Linda Dunn then filed an appeal of the Board's Decision to the District Court. R., pp. 9-25. The District Court held a trial *de novo*, on an agreed record, pursuant to Idaho Code § 63–3812(c). The District Court, too, affirmed the

Commission's Decision. R., pp. 114-128. Linda Dunn then filed this appeal with the Idaho Supreme Court. R., pp. 129-133.

Because this case so completely revolves around whether the District Court's conclusions were legally correct, for ease of reference here, the Commission includes the District Court's Memorandum Decision being appealed in this case. It is appended to this brief as an addendum. (The Decision is denominated in the Addendum as Document #1: Memorandum Decision and Order on Plaintiff's Petition for Judicial Review (June 8, 2016), R., pp. 114-128.)

III. Statement of Facts

While the Commission substantially agrees with the facts set out in the Appellant's Brief, App. Brief, pp. 2-3, the Commission notes that the Appellant's Brief included many more facts than are necessary for the resolution of this case. A more concise statement of the facts is as follows:

The parties agreed below that there were no factual disputes, and that the only issue on appeal to the District Court was whether Linda Dunn is liable for income tax on her one-half community property interest in the wages her husband earned out-of-state. *See* Joint Stipulation of Facts (Stipulation) at ¶ 4. R., pp. 38-52.

In this case, Barry and Linda Dunn were married for all the years at issue (2000-2001, 2003-2005, and 2007-2010) (taxable years). R., p. 39, 115. But the couple lived apart during the taxable years. *See* R., pp. 39-40, 115. For his part, Barry Dunn generally lived and had his place of domicile in those states in which he was working. See R., pp. 39-40, 115. Specifically, Barry Dunn was domiciled in Washington in 2000-2001, and was domiciled in Texas during 2003-2010. R., pp. 39-40, 115. For her part, Linda Dunn was a resident and domiciled in Idaho for all the taxable years. R., pp. 39, 115.

ISSUES ON APPEAL[1]

The issues to be decided by this Court are:

1. Whether the District Court correctly determined that an Idaho resident's interest in her spouse's community property wages, earned out-of-state, is subject to income taxation; and

2. Whether the District Court correctly concluded that there are no constitutional violations here.

[1] The Appellant's Brief identifies eleven (11) different issues to be decided in this appeal. The Commission believes that all the issues in the case can be fairly decided within the framework of its stated issues here.

ARGUMENT

I. Standard of Review

"Where the district court conducts a trial de novo in an appeal of a [Board of Tax Appeals] decision, this Court defers to the district court's findings of fact that are supported by substantial evidence, but exercises free review over the district court's conclusions of law." *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 419-20, 247 P.3d 644, 646-47 (2011) (internal quotation and citation omitted).

There are no disputes regarding any factual findings in this case; rather, the only matters for review are the District Court's legal conclusions. Thus, over these legal conclusions, this Court exercises "free review." *Kimbrough*, 150 Idaho at 419-20, 247 P.3d at 646-47; *see also Mann v. Granite Reeder Water & Sewer Dist.*, 143 Idaho 248, 251, 141 P.3d 1117, 1120 (2006).

II. Summary of the Argument

This appeal presents the straightforward legal issue of whether the District Court was correct that Linda Dunn's share of community income is taxable in Idaho. To be clear, the District Court *was* correct: Linda Dunn has a community property interest in her husband's wages, and as an Idaho resident, she is required to pay tax on that community income.

First, the wages that her husband, Barry Dunn, earned in Texas and Washington are community property under those states' laws. (Appellant's Brief does not substantively address the District Court's determination as to Washington law in this appeal. Accordingly, the Commission will address Washington law only briefly below.) In turn, the District Court correctly followed Idaho law which holds that the income Linda Dunn received from her one-half interest in her husband's wages, is taxable, even if those wages were earned out-of-state.

Finally, the District Court was correct that there are no constitutional violations here. Both the Commerce Clause and the Privileges and Immunities Clause are not implicated by the facts of this case. Appellant's Brief maintains that Idaho is unconstitutionally reaching beyond its borders and directly taxing a non-resident for non-Idaho sourced income. It is not; it is simply attributing her interest in her husband's wages to her, just as this Court approved of in *Parker v. Idaho State Tax Commission*, 148 Idaho 842, 230 P.3d 734 (2010). As the District Court noted, the only interest subject to Idaho tax liability is Linda Dunn's interest in community property. Following Idaho legal precedent, the District Court correctly concluded that the taxation of Linda Dunn's one-half interest in Barry Dunn's Texas and Washington earnings does not at all violate the Commerce Clause or the Privileges and Immunities Clause.

The arguments in Appellant's Brief rest on one faulty assumption: that the Tax Commission is trying to tax a non-resident. To be clear, the Commission is not claiming that Barry Dunn owed Idaho tax on his one-half share of his Texas or Washington earnings. The Commission has not assessed *any* tax liability on Barry Dunn's interest in his earnings. Moreover, income received from an out-of-state source is clearly taxable.

The District Court was correct in its legal conclusions; its determinations in favor of the Commission should be affirmed.

III. Because Linda Dunn has a community property interest in her husband's wages, the District Court correctly determined that such income was taxable.

Linda Dunn was a resident of Idaho for the taxable years. Therefore, all her income—from whatever source derived, and even from a source outside Idaho—is taxable in Idaho. *See* Idaho Code §§ 63-3002 and -3013; *see also Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964).

Her husband, Barry Dunn, earned wages in Texas and Washington that are community property. The District Court correctly analyzed Texas and Washington law to determine that Barry Dunn's wages during the relevant years were community income.[2] As a member of the marital community, Linda Dunn owns a one-half interest in the income earned by her spouse.

A. The wages Barry Dunn earned in Texas and Washington are community property under those states' laws.

By way of reminder, Barry Dunn generally lived and had his place of domicile in those states in which he was working. Specifically, Barry Dunn was domiciled in Washington in 2000-2001, and was domiciled in Texas during 2003-2010. Linda Dunn was domiciled in Idaho for all the taxable years.

We will now analyze the laws of the states where Barry Dunn earned his wages.

Texas:

The wages that Barry Dunn earned in Texas are community property. Appellant's Brief contends that, applying a particular Texas statute, Barry Dunn's wages were the *equivalent* of separate property. This is not accurate, as Texas case law makes it clear that his wages are community property in which his spouse has a one-half interest, as explained below.

In general, "community property under Texas law consists of all property either spouse acquired during the marriage 'other than separate property.'" *Douglas v. Delp*, 987 S.W.2d 879,

---

[2] It is arguable that Idaho community property law (and not Texas or Washington law) should have controlled whether Barry Dunn's income was community property. However, the Commission has not asserted that position in this case. Generally, the Commission takes the position that the laws applicable to marital assets will largely be determined by the spouses' domiciles (*i.e.*, a person's income living in a community property state is community income, and a person's income in a non-community property state is separate income). *See* Idaho State Tax Commission Publication 175 COMMUNITY PROPERTY, https://tax.idaho.gov, Rev. Oct. 15, 2012, at 2-3. This position mirrors the federal taxation scheme. *See* Treas. Reg. § 1.66–1 ("Treatment of community income") (providing that the law of the state where one is domiciled governs whether there is community income or separate income for federal tax purposes).

883 (Tex. 1999) (*citing* Tex. Fam. Code § 3.002); *see also* Texas Constitution, article XVI, sect. 15. In fact, like Idaho, there is a presumption in Texas law that all property held by the spouses is community property. Tex. Fam. Code § 3.003. A spouse who wishes to rebut that presumption in order to show that property is separate property, must do so "by clear and convincing evidence." Tex. Fam. Code § 3.003.

In Texas, the characterization of property as either community property or separate property is determined at the time of its acquisition, or at the "inception of title to the property." *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App. 2004) (internal citations omitted). "[A]ny spouse's personal income is community property." *McClary v. Thompson*, 65 S.W.3d 829, 834 (Tex. App. 2002) (internal citations omitted); *see also Maben v. Maben,* 574 S.W.2d 229, 232 (Tex. Civ. App. 1978) (personal earnings are community property if earned during marriage).

This brings us to the feature of Texas community property law that Appellant's Brief focuses on: Texas recognizes both sole-management and joint-management of community property. Tex. Fam. Code § 3.102 ("Managing Community Property"). Sole-management community property is sometimes also known as "special community property." *See Valdez* v. *Ramirez,* 574 S.W.2d 748, 750-51 (Tex.1978). (This brief will use the term most commonly used in Texas case law: "sole-management community property.")

What is the nature of sole-management community property? The statute provides that, during marriage, "each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including: . . . personal earnings." Tex. Fam. Code § 3.102. Simply put, sole-management community property is community property that is subject to one spouse's "sole management, control, and disposition."

Valdez, 574 S.W.2d at 750-51; *see also Medenco, Inc.* v. *Myklebust,* 615 S.W.2d 187, 189 (Tex. 1981).

Because of this sole-management feature, Appellant's Brief maintains that Barry Dunn had sole-management over his Texas earnings, and that, therefore, this is the *equivalent* of it being separate property. Said in the negative, Appellant's Brief argues that Linda Dunn functionally had no rights to the money that Barry Dunn earned, and therefore, his wages were not actually community property in the normal meaning of the term. Appellant's Brief is unable to identify a single case that supports its theory.[3]

To the contrary, Texas law is clear that the sole-management community property is not the equivalent of separate property. First, the non-management spouse still retains a community property interest in the sole-management community property. "Each spouse owns an undivided one-half interest in all community assets and funds *regardless of which spouse has management and control.*" *Massey v. Massey*, 807 S.W.2d 391, 401 (Tex. App. 1991) (emphasis added).[4] (Tellingly, in the Appellant's Brief, there is *no mention* of the *Massey* case.) Here, Linda Dunn still owned an undivided one-half interest in all community assets—including the personal earnings of Barry Dunn during the taxable years—regardless of the fact that Barry Dunn may have been given sole management, control or disposition.

Second, this argument is incorrect because, under Texas law, Barry Dunn's wages were never transmuted from community property to separate property. Generally, the character of

---

[3] Appellant's Brief relies on *Douglas v. Delp*, 987 S.W. 2d 879 (Tex. 1999). However, other than the basic statements of community property law (see discussion above), *Douglas* does not further Linda Dunn's particular legal argument. This is because *Douglas* holds merely that where one spouse had filed a bankruptcy, the other spouse lacked standing in state court to recover damages for injury to the community estate, but needed to pursue the matter in bankruptcy court. *Id.*, 987 S.W.2d at 883.

[4] *See also Carnes* v. *Meador,* 533 S.W.2d 368, 371 (Tex. Civ. App. 1975) (each spouse owns an undivided one-half interest in all community assets and funds regardless of which spouse has management and control).

earnings as community property attaches when those earnings accrue. *Loaiza* v. *Loaiza.* 130 S.W.3d 894, 909 (Tex. App. 2004) (cited by the District Court, R., p. 117).[5] Here, the wages of Barry Dunn were community property from the moment he acquired the wages and did not later transmute into separate property.[6]

Thus, the fact that Barry Dunn's personal earnings in Texas can be considered to be sole-management community property with special management privileges, does not change the earnings' characterization as community property in which Linda Dunn has an interest. The District Court correctly determined that, even though sole-management community property does possess some of the characteristics of separate property, "this characterization [as sole-management community property] does not divest the non-earning spouse of her one-half undivided interest in those wages, nor does it transmute those wages from community property to separate property as [Linda Dunn] suggests." R., p. 118.

Finally, Appellant's Brief presents one other argument. This argument relies on Tex. Fam. Code § 3.202 ("Rules of Marital Property Liability"), which provides that sole-management community property is not subject to any nontortious liability that the other spouse

---

[5] Texas law does allow spouses to transmute all or part of their community property into separate property, but this is accomplished via an "exchange" between themselves. Tex. Fam. Code § 4.102. Such property, when exchanged, becomes that spouse's separate property. *Id.* Such an exchange must be accomplished by a writing and signed by the parties. Tex. Fam. Code § 4.104. Here, there is no evidence of a written exchange or transfer of community property. It is stipulated that Barry Dunn derived the Texas income in Texas, while a Texas resident. The record shows that Barry Dunn's earnings in Texas retained their status as community property. His income is community property which was never transmuted into separate property via an exchange.

[6] Appellant's Brief cites to *Perez v. Perez*, 587 S.W.2d 671 (S.C. Texas 1979). But *Perez* merely analyzed whether a military benefit was community versus separate property. It says nothing about sole-management community property being considered to be separate property. Nor does it hold that a non-earning spouse has no rights to the other spouse's personal earnings. Reference to *Perez* is not helpful in this case.

incurs during marriage. *Id.*[7] Appellant's Brief concludes that Barry Dunn's special community property earnings therefore are not subject to liability for the debts incurred by Linda Dunn.[8]

However, Section 3.202, Tex. Fam. Code, does not operate as a bar against Linda Dunn paying tax in Idaho on her one-half share of community income. By its plain language, Section 3.202, Tex. Fam. Code, merely prohibits a creditor from attaching sole-management community property to satisfy the other spouse's debt. As the District Court correctly noted, though, the Commission "is not seeking the wages of Mr. Dunn to satisfy a debt, rather, it is assessing a tax on [Linda Dunn] for her one-half interest to income earned during marriage." R., p. 119.[9]

In conclusion, the District Court was correct when it perceived the issue before it, whether Linda Dunn "had a vested interest in the community property of the marriage." R., p. 119. It correctly noted that under Texas law, Linda Dunn did have a one-half undivided interest in the Texas earnings of Barry Dunn. R., p. 119. Because Linda Dunn's domicile at the time she received an interest in Barry Dunn's wages was Idaho, "as an Idaho resident, [her] one-half interest in [his] income is subject to the tax laws of the State of Idaho." R., p. 120.

---

[7] Section 3.202, Tex. Fam. Code, provides: "Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse's sole management, control, and disposition is not subject to: . . . any nontortious liabilities that the other spouse incurs during marriage." *Id.*

[8] The Appellant's Brief cites several other cases in support of its position, including *Beal Bank v. Gilbert*, 417 S.W. 3d 704 (Tex. App. 2013), *Montemayor v. Ortiz*, 208 S.W. 3d 627 (Tex. App. 2006), and *In re Hall*, 559 B.R. 463, 466 (Bankr. S.D. Tex. 2016). These cases do not apply here because they are factually distinguishable in that the Commission is not seeking payment from Barry Dunn's separate income or his sole-management community property.

[9] The Appellant's Brief objects to the District Court having analyzed the Texas case of *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App. 1998), because the case deals with federal tax liability, and not state tax liability. But the District Court recognized this factual difference and weighed the import of the case accordingly. The rationale of *Kimsey* is applicable to the facts in this case. Moreover, even though a federal tax was at issue, that distinction does not matter. The point of citing to *Kimsey* is to show that under Texas law "if a spouse can be responsible for the entire tax liability of the marriage, they are responsible for the liability of both spouses even if the liable party is the non-earning spouse." R., p. 119. Accordingly, the District Court correctly concluded that "a non-earning spouse may have tax liability even where the income would be considered special community property." R., p. 119.

Washington:

Under Washington law, Barry Dunn's wages earned and acquired there are community property. Linda Dunn had a vested interest in the community property wages earned by her spouse. The District Court correctly analyzed how the wages earned in Washington for the taxable years are community income, and how Linda Dunn's community interest in those wages are taxable in Idaho. *See* Memo Dec., R., pp. 120-21. No party has appealed this determination.

B. Under Idaho law, Linda Dunn must report the income she received from her one-half interest in her husband's wages, even if those wages were earned out-of-state.

In doing an analysis of other states' laws, the question to be answered only pertains to the characterization of the income earned in those states as community or separate property. What is *not* in question is Idaho's own ability to impose tax on its own residents' income. This is an important distinction because the Appellant's Brief conflates the two concepts.[10]

Under Idaho law, an individual's residency affects ones income tax liability. *See* Idaho Code §§ 63-3002 and -3013. That's because a person's residency determines what income the State of Idaho can tax. In Idaho, it is the intent of the legislature to impose a tax on Idaho residents' income "wherever derived." Idaho Code § 63-3002; *see also* Idaho Code §§ 63-3011B, -3011C; I.R.C. §§ 61, 63. Thus, as an Idaho resident, Linda Dunn is taxed on all of the income she received during the taxable years while living in Idaho.

Moreover, a resident's income is taxed *regardless of where it is actually earned.* This Court has explained that there is no constitutional prohibition against a state's exercise of power

[10] For example, just because Texas law may apply in determining whether Barry Dunn's Texas wages are community or separate property, it does not mean that Idaho is somehow invading Texas and seizing Barry Dunn's wages; nor does it even mean that it is taxing Barry Dunn's Texas wages. The bottom line is that Idaho is taxing whatever community property income its resident, Linda Dunn, owns due to the wages earned by her husband.

to tax a resident's income derived from sources *outside* the state. *Herndon,* 87 Idaho at 340, 393 P.2d at 37.[11]

Appellant's Brief cites to no case that cuts against this principle.[12] (Inexplicably, Appellant's Brief does not even cite to *Herndon.*) To the contrary, this Court has recently re-asserted the precedent in *Herndon.* In *Parker*, this Court cited to *Herndon* for support that there is nothing in the Tax Commission's act of taxing the wife's community property share of income—even though that income was derived from the husband's earnings out-of-state—to implicate the Due Process Clause. *Parker*, 148 Idaho at 847, 230 P.3d at 739.

The District Court said it best:

> In the present case Mr. Dunn earned wages in Washington and Texas during the years in question. At no time was Mr. Dunn a resident of Idaho. [Linda Dunn] was a resident of Idaho during all relevant years. During that time Mr. Dunn's wages can be properly characterized as the property of the marital community pursuant to Texas, Washington, and Idaho law. As a resident of Idaho [Linda Dunn's] interest in Mr. Dunn's wages is attributable to her as income and as such, is taxable by the State of Idaho.

R., p. 122.

Appellant's Brief has cited to no legal authority that stands for the proposition that a state may not tax its residents on income from out-of-state sources. The District Court should be affirmed.

---

[11] This Court explained in *Herndon* that "[t]he rationale for allowing a state to compute a tax on income earned elsewhere is based on the premise that inhabitants are supplied many services by their state of residence and should contribute toward the support of the state, no matter where their income is earned." *Herndon*, 87 Idaho at 340, 393 P.2d at 37.

[12] Appellant's Brief argues that the holding in *Blangers v. State, Dept. of Revenue and Taxation*, 114 Idaho 944, 763 P.2d 1052 (1988) would prevent the taxation here. However, *Blangers* dealt with taxation of *non-residents* in Idaho who temporarily passed through Idaho on business. Its holding is inapplicable here because, in this case, there is no non-resident being taxed by Idaho.

IV. The District Court was correct that there are no constitutional violations here.

The facts of this case present no violation of the United States Commerce Clause, or the Privileges and Immunities Clause.

A. The Commerce Clause is not implicated by the facts of this case.

Appellant's Brief argues that there is violation of the U.S. Commerce Clause, Article I, § 8 of the U.S. Constitution. In *Parker*, as in this case, one Idaho resident argued that taxing her husband's out-of-state earnings would violate the Commerce Clause, Article I, Section 8 of the U.S. Constitution. "To show that the Commerce Clause is implicated by a tax statute, [a taxpayer] must demonstrate that the state's taxation of [her] entire income has a substantial effect on an identifiable interstate economic activity or market." *Parker*, 148 Idaho at 847, 230 P.3d at 739 (internal quotations and citations omitted).

Thus, the District Court below accurately held that Linda Dunn needed to show that "the application of Idaho's taxing statute somehow substantially affects interstate commerce for the Commerce Clause to be implicated." Memo. Dec., R., p. 122 (*citing United States* v. *Lopez,* 514 U.S. 549, 559, 115 S.Ct. 1624, 1630, 131 L. Ed. 2d 626, 632 (1995)). Appellant's Brief has failed to identify *any* interstate economic activity or market that is burdened by the taxation of Linda Dunn's community income. The Commerce Clause is not implicated in this case. *See Parker*, 148 Idaho at 847, 230 P.3d at 739.

In particular, Appellant's Brief postulates that the holding in *Comptroller of Treasury of Maryland v. Wynne* effectively renders Idaho's personal income tax scheme unconstitutional, as a violation of the "dormant Commerce Clause." 135 S. Ct. 178, 191 L. Ed. 2d 813 (2015). Appellant's Brief incorrectly reasons that the Constitution restricts the Commission because

Barry Dunn's income is "affected" even though he was not an Idaho resident. As explained below the Supreme Court's decision in *Wynne* neither requires nor suggests this outcome. Indeed, the "internal consistency test" described by the U.S. Supreme Court in that case supports the Tax Commission's imposition of tax on Linda Dunn's income. This argument is a red herring.

In *Wynne*, the U.S. Supreme Court ruled that the negative stroke of the Commerce Clause of the Constitution prohibited Maryland from "tax[ing] a transaction more heavily when it crosses state lines than when it occurs entirely within the state." 135 S. Ct. at 1790 (internal quotation omitted). Specifically, the Court found that one of Maryland's statewide income taxes, called a "county" income tax, violated the Commerce Clause as Maryland did not permit Maryland taxpayers to apply a credit for taxes paid to other states against the "county" tax. 135 S. Ct. at 1792. The Court reasoned that by not permitting taxpayers to apply such a credit, Maryland subjected them to the risk of double taxation as the "county" tax did not account for income apportioned to other states. 135 S. Ct. at 1795.

First, as to the issue of a credit for taxes paid to other states, Appellant's Brief has neither argued nor provided any evidence that Linda Dunn is entitled to such a credit in any state. This case merely presents the question of how to tax Linda Dunn's one-half, community-property interest in her husband's wages. But no party here actually paid any income tax to Texas. (Texas has no individual income tax.) As such there simply is no credit for out-of-state taxes to claim. Reliance on *Wynne* is misplaced as this matter has nothing to do with offering credit for taxes paid to other states.[13]

---

[13] Appellant's Brief cites to *Corrigan v. Testa*, ___N.E.3d___, 2016 WL 2341977 (S.C. Ohio, 2016) in its discussion of *Wynne*. But *Corrigan* dealt with the question whether a state could directly tax a *non-resident*. In the present case, unlike the facts in *Corrigan*, the Commission is taxing its own resident. *Corrigan* is inapt.

Second, Appellant's Brief unnecessarily calls this Court's attention to the internal consistency test that the U.S. Supreme Court uses in *Wynne*. Appellant's Brief cites to this test in an attempt to demonstrate that Linda Dunn, an Idaho taxpayer with an interest in wages earned out-of-state, is receiving inconsistent treatment between Texas and Idaho. Appellant's Brief points out that in Texas, this income went untaxed, and argues that it is violative of the internal consistency test for Idaho to impose a tax on that income. But this argument shows a fundamental misunderstanding of the internal consistency test.

The internal consistency test does not require that each state adopt identical tax provisions. [14] Instead, it merely poses the following question: "If every state used the same tax scheme, would interstate commerce be at a disadvantage as compared to intrastate commerce?" *Wynne*, 135 S. Ct. at 1802. If the answer to this question is "no," then the analyzed tax scheme passes the internal consistency test.[15]

Because Appellant's Brief has not provided evidence or argument to demonstrate that Linda Dunn was entitled to a credit for taxes paid to another state, the *Wynne* case simply does not apply. Furthermore, Idaho's tax scheme easily passes the internal consistency test employed by the U.S. Supreme Court. For all these reasons, there is no Commerce Clause problem.

---

[14] As the Court stated in *Wynne*, "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States. . . . If it did, Maryland's tax scheme would survive the internal consistency test and would not be inherently discriminatory." *Wynne*, 135 S. Ct. at 1805 (internal citation omitted). Idaho does provide a credit for income taxes paid to other states. Idaho Code § 63-3029.

[15] In this matter, while the use of the internal consistency test is unnecessary, the Idaho tax scheme passes it easily. It is unnecessary to apply this test as there is no out-of-state taxpayer being taxed. Even in its application, if every state adopted Idaho's tax scheme—including its provision for credit for taxes paid to another state—its imposition of tax upon a resident's one-half community property interest in out-of-state wages would not be treated comparatively better than a similarly situated taxpayer also paying tax to another state. The latter, multi-state taxpayer would simply receive a credit for out-of-state taxes paid and would not be burdened with additional tax liability.

B. There is no violation of the Privileges and Immunities Clause.

Appellant's Brief also argues that the Privileges and Immunities Clause, Article IV, Section 2 of the U.S. Constitution, applies here to invalidate Idaho's taxation of Linda Dunn. This is not the case; there is no violation of the Privileges and Immunities Clause.

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* Generally speaking this means that states are prohibited from discrimination against citizens of *other* states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. *See Toomer v. Witsell*, 334 U.S. 385, 396, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460 (1948).

In the case of taxation, the Privileges and Immunities Clause stands for the proposition that a state must offer "substantial equality of treatment" as between its citizens and the nonresident taxpayer. *Austin v. New Hampshire*, 420 U.S. 656, 665, 95 S. Ct. 1191, 1197, 43 L. Ed. 2d 530 (1975). Thus, this Court invalidated a statute that provided a larger tax credit to Idaho residents than it did to non-residents. *State ex rel. Haworth v. Berntsen*, 68 Idaho 539, 543-46, 200 P.2d 1007, 1008-10 (1948).

Here, however, as the District Court determined, "there can be no violation of the privileges and immunities clause because [Linda Dunn] has not shown disparate treatment between non-resident and resident tax liability. Again, it is not the income attributable to Mr. Dunn that is being taxed; [the Commission] is taxing only [Linda Dunn's] vested one-half interest in Mr. Dunn's wages." R., p. 125.[16]

---

[16] Appellant's Brief here relies on *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 288, 118 S. Ct. 766, 769, 139 L. Ed. 2d 717 (1998). However, that case is easily distinguished on the facts here. In *Lunding*, the Supreme Court invalidated a state tax that expressly discriminated against non-residents. Here, there is no showing of discriminatory tax treatment of non-residents relative to residents.

The Commission is not seeking to impose a tax on the husband, Barry Dunn. Therefore, there is no occasion of Barry Dunn having to pay tax in Idaho greater than what he paid in another state. This argument is without substance. Rather, Linda Dunn owes tax for her one-half share of the wages earned by her husband, as those wages are income attributable to her. *Parker*, 148 Idaho at 847, 230 P.3d at 739.

CONCLUSION

The Plaintiff's arguments all seem to flow from the view that the State of Idaho is somehow directly taxing Barry Dunn's wages. However, that view is simply incorrect. The taxation in this case is not on Barry Dunn or his wages; the only taxation here is on the income of Linda Dunn, an Idaho resident. The taxes imposed on Linda Dunn's income are proper, correct, and constitutional.

For this and the reasons stated above, the order of the District Court should be affirmed.

DATED this 31 day of January 2017.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

David B. Young
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of January 2017, I caused to be served two (2) true and correct copies of the foregoing **RESPONDENT IDAHO STATE TAX COMMISSION'S BRIEF** by depositing the same in the United States mail, postage prepaid, in an envelope addressed to:

ROBERT E. KOVACEVICH
818 W. Riverside Ave., No. 525
Spokane, Washington 99201

[Attorney for Appellant admitted pro hac vice]

RICHARD W. KOCHANSKY
408 E. Sherman, Suite 309
Coeur d'Alene, Idaho 83814

[Attorney for Appellant]

David B. Young
Deputy Attorney General

ADDENDUM

Document #1: Memorandum Decision and Order on Plaintiff's Petition for Judicial Review (June 8, 2016)
(R., pp. 114-128.)

Addendum Document #1:

Memorandum Decision and Order on Plaintiff's Petition for Judicial Review (June 8, 2016) (R., pp. 114-128)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LINDA DUNN, *Petitioner/Plaintiff* v. **IDAHO STATE TAX COMMISSION,** *Respondent/Defendant.*	**CASE NO. CV-15-3329** **MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S PETITION FOR REVIEW**

Linda Dunn ("Petitioner") filed this petition for judicial review from a final decision of the Idaho State Tax Commission ("Defendant"). Petitioner and Defendant have filed a joint stipulation of facts and submitted the matter to the Court on the briefing. Petitioner is represented by Robert E. Kovacevich, Attorney at Law, and Richard W. Kochansky, Attorney at Law. Defendant is represented by David B. Young, Deputy Attorney General.

I. FACTS

The facts herein are taken from the Joint Stipulation of Facts submitted by the parties on February 22, 2011. This is an agency appeal from a decision of the Idaho Tax Commission entered on April 17, 2015. This appeal was timely filed with this Court. Petitioner paid the security deposit required to allow this appeal pursuant to Idaho Code § 63-3049(b).

Petitioner was married to Barry Dunn for all the years relevant to this action. The taxable years at issue are: 2000-01, 2003-05, and 2007-10. During the years in question Mr. Dunn worked for Udelhoven Inc., a Texas company. Mr. Dunn generally lived and had his place of domicile in those states in which he was working. At no time was Mr. Dunn domiciled in the State of Idaho. Mr. Dunn resided in Washington in 2000 and was domiciled in Washington or Alaska in 2001. Mr. Dunn was domiciled in Alaska during 2002. Mr. Dunn was domiciled in Alaska or Texas during 2003. Mr. Dunn was domiciled in Texas from 2004 through 2010. Petitioner was domiciled in Idaho during all of the years in question.

All of the wages earned by Mr. Dunn were deposited into his bank account in the city of Tomball, Texas. Mr. Dunn never performed any work, or earned any wages in the State of Idaho. Petitioner and Mr. Dunn filed federal tax returns as married filing jointly during the years in question. The Idaho State Tax Commission levied a deficiency against Petitioner's one-half community property interest in Mr. Dunn's wages. The decision entered by the Idaho Tax Commission was only addressed to income Defendant attributed to Petitioner. Mr. Dunn passed away in 2012. To date there has been no probate of Mr. Dunn's estate.

Petitioner argues the earnings of Mr. Dunn in Texas were special community property and cannot be subject to the debts of Petitioner. Further, Petitioner argues Idaho's taxation of wages earned by a non-resident spouse violateS the Commerce Clause and the Privileges and Immunities Clause of the United States Constitutions. Petitioner seeks a reversal of the decision of the Idaho State Tax Commission, a refund of all amounts paid for the years in question, and that Petitioner be paid interest on the amounts paid.

Defendant argues that it has not imposed a tax on Mr. Dunn, rather it has imposed personal income tax on Petitioner reflecting her one-half community interest in the earnings of

Mr. Dunn. Defendant avers that Petitioner is required to report her income and pay tax in Idaho on her income regardless of the source of that income. Defendant argues that both Texas and Washington are community property states and both recognize that a non-earning spouse has a one-half vested interest in the wages earned by the earning spouse. Further, Defendant argues that as a resident Petitioner is subject to the tax provisions of the State of Idaho. Defendant requests the Complaint be dismissed, the decision of the Idaho State Tax Commission be affirmed, and all of Defendant's costs and reasonable attorneys' fees incurred in defending this action be awarded.

I. STANDARD OF REVIEW

A taxpayer may request review of a decision by the Tax Commission to the district court by filing a complaint against the Tax Commission pursuant to Idaho Code § 63–3049. "The case proceeds as a de novo bench trial in the district court." *Parker v. Idaho State Tax Comm'n,* 148 Idaho 842, 845, 230 P.3d 734, 737 (2010). The reviewing court will proceed with the review as it would any other civil case. *Lockheed Martin Corp. v. Idaho State Tax Comm'n,* 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). The court will utilize the Commission record only as the stated position of a party to the civil action. *Id.*

II. DISCUSSION

1. Character of the Wages of Mr. Dunn.

a. In Texas property is characterized as community or separate at the time property is acquired.

Characterization of property is determined by the time and circumstances of its acquisition. *Leighton v. Leighton,* 921 S.W.2d 365, 367 (Tex.App 1996) *citing Carter v. Carter,* 736 S.W.2d 775, 780 (Tex.App. 1987). "This doctrine, known as inception of title, arises when a

party first has right of claim to the property by virtue of which title is finally vested." *Scott v. Estate of Scott,* 973 S.W.2d 694 (Tex.App. 1998).

Personal earnings are community property if earned during marriage. *Maben v. Maben,* 574 S.W.2d 229, 232 (Tex. Civ. App. 1978). Though personal earnings are community property, Texas law has classified this kind of community property as "special community." *Valdez v. Ramirez,* 574 S.W.2d 748, 750–51 (Tex.1978). "Special community is community property that is subject to one spouse's sole management, control, and disposition." *Valdez,* 574 S.W.2d at 750–51. Personal earnings are subject to the sole management, control, and disposition of the employee spouse. *Medenco, Inc. v. Myklebust,* 615 S.W.2d 187, 189 (Tex. 1981). Each spouse owns an undivided one-half interest in all community assets and funds regardless of which spouse has management and control. *Carnes v. Meador,* 533 S.W.2d 365, 371 (Tex. Civ. App. 1975). Generally, the character of earnings as community property attaches when those earnings accrue. *Loaiza v. Loaiza,* 130 S.W.3d 894, 909 (Tex. Ct. App. 2004).

Petitioner argues that Texas law applies to the wages of Mr. Dunn and treats those wages as Mr. Dunn's separate property. Reply Brief L. Dunn at 2. Petitioner avers that she had no enforceable right to her husband's wages because Mr. Dunn exercised sole dominion and control over his earnings. *Id.* Therefore, Petitioner argues that because she had no right in the wages of her husband the wages cannot be transmuted into community property for purposes of income in Idaho. *Id.* Moreover, Petitioner argues that because Mr. Dunn's earnings are special community property Mr. Dunn's earnings are not subject to liability for the debts incurred by Petitioner. Petitioner's Reply Brief at 4.

Defendant argues that while the law of the state where the wages were earned determines the character of the property at issue, Texas law provides that wages earned during marriage are

community property. Defendant's Reply Brief at 3. Defendant contends that Petitioner's one-half interest in the wages of Mr. Dunn is properly subject to personal income tax in the State of Idaho. *Id.*

Texas case law makes clear that wages earned during marriage are community property. There is no dispute that Petitioner and Mr. Dunn were married during the period of time in question. Mr. Dunn was domiciled in Texas during the years in question. Petitioner was domiciled in Idaho during this same period. The issues regarding the Texas wages earned by Mr. Dunn are whether Petitioner had a one-half interest in those wages and whether wages characterized as special community property are treated as separate property for purposes of Petitioner's Idaho income tax.

Wages earned by a spouse domiciled in Texas are presumptively community property and each spouse owns a one-half undivided interest in those wages. *See Maben,* 574 S.W.2d 229, 232. Where those wages are earned by one spouse and are subject to the sole management and control of the earning spouse, Texas law characterizes them as special community property. *Valdez,* 574 S.W.2d at 750–51. However, this characterization does not divest the non-earning spouse of her one-half undivided interest in those wages, nor does it transmute those wages from community property to separate property as Petitioner suggests. Petitioner's one-half undivided interest in Mr. Dunn's wages vested at the same time Mr. Dunn's interest vested: when they were earned.

Special community property does possess some of the characteristics of separate property. However, Petitioner's argument that special community property cannot be liable for the tax liability of the non-earning spouse is not supported in the law. In *Kimsey v. Kimsey,* 965 S.W.2d 690 (Ct. App. Texas 1998), the Texas Court of Appeals held:

> While the trial court can determine whether the parties will file a joint return or as married filing separately for years preceding the divorce, the court cannot alter the means of reporting income. It does have the discretion to apportion the *payment* of taxes as between the parties. . . . **Thus, a spouse may be liable for the entire tax liability although the income was totally earned by the other spouse.** If a husband and wife file as married filing separately, each is liable only for the tax due on his or her own return. *See Edith Stokby v. C.I.R.*, 26 T.C. 912, 1956 WL 725(A)(1956).

Kimsey v. Kimsey, 965 S.W.2d 690, 696 (Tex. App. 1998) (emphasis added). While *Kimsey* dealt with liability of a spouse regarding federal taxes, the rationale sounds in the present case. It follows that if a spouse can be responsible for the entire tax liability of the marriage, they are responsible for the liability of both spouses even if the liable party is the non-earning spouse. Thus, a non-earning spouse may have tax liability even where the income would be considered special community property. Further, Defendant is not seeking the wages of Mr. Dunn to satisfy a debt, rather, it is assessing a tax on Petitioner for her one-half interest in income earned during marriage.

This Court is to determine whether Petitioner had a vested interest in the community property of the marriage. Under Texas law, as well as Idaho law, this Court determines that Petitioner did have an interest in Mr. Dunn's wages.

Further, the tax liability in the present case is based on Petitioner's one-half undivided interest in the Texas earnings of Mr. Dunn. The interest in the earnings of Mr. Dunn vested in Petitioner at the time they accrued. The Court determines that Texas law is dispositive of the character of the earnings. Once that characterization is made (as it is here) that Petitioner had a one-half undivided interest in the wages then Idaho law applies to Petitioner's interest in those wages based on Petitioner's domicile in Idaho. The state of domicile at the time property is acquired determines the characterization of property as community or separate. *See Berle v.*

Berle, 97 Idaho 452, 546 P.2d 407 (1976) (finding marital property acquired in New Jersey prior to couple relocating in Idaho was characterized by the law of the domicile at the time of acquisition). Petitioner's domicile at the time she received an interest in Mr. Dunn's wages was Idaho. Therefore, as an Idaho resident, Petitioner's one-half interest in Mr. Dunn's income is subject to the tax laws of the State of Idaho.

b. In Washington property is characterized as community or separate at the time property is acquired.

The character of property is determined by the law of the domicile at the time of its acquisition. *In re Marriage of Landry*, 699 P.2d 214, 216 (Wash. 1985). "The theory underlying community property is that it is obtained by the efforts of either the husband or wife, or both, for the benefit of the community." *Togliatti v. Robertson*, 190 P.2d 575 (Wash. 1948). However, Revised Code of Washington § 26.16.140 provides that the respective earnings of a husband and wife who are living separate and apart "shall be the separate property of each." *See Beakley v. Bremerton*, 105 P.2d 40 (Wash. 1940) (citing Revised Code of Washington § 26.16.140). "The law distinguishes between a 'marital' and a 'community' relationship, the latter concept encompassing more than mere satisfaction of the legal requirements of marriage. It is the fact of community that gives rise to the community property statute; when there is no 'community', there can be no community property." *Aetna Life Ins. Co. v. Bunt*, 754 P.2d 993, 995-96 (Wash. 1988), *opinion modified on denial of reconsideration* (July 28, 1988).

In order for earnings attributed to one spouse to be considered the separate property of the earning spouse there must be some showing that the marriage is defunct. *MacKenzie v. Sellner*, 361 P.2d 165 (Wash. 1961). The Washington Supreme Court has defined defunct as follows:

> A marriage is considered "defunct" when *both* parties to the marriage no longer have the will to continue the marital

> relationship. In other words, when the deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation, the marriage is considered "defunct" so that the "living separate and apart" statute applies.

In re Marriage of Short, 890 P.2d 12 (Wash. 1995) (internal citations omitted).

In the present case Mr. Dunn's wages earned in Washington is properly considered community property. There has been no showing that the marriage between Mr. Dunn and Petitioner was defunct. In order for Mr. Dunn's wages to be considered his separate property Petitioner is required to demonstrate there was no normal marital relationship and there was hope for restoration of the unity. This Court determines that Petitioner's marriage to Mr. Dunn was not defunct as that term is understood under Washington law. Therefore, Petitioner had a vested interest in the community property wages earned by Mr. Dunn in the State of Washington. As with the wages earned in Texas, the wages earned in Washington are subject to taxation under the laws of the State of Idaho as the domicile of Petitioner.

c. Wages earned outside of Idaho by a non-resident spouse are attributable as income to a resident non-earning spouse.

"Idaho Code § 32-906(1) defines as community property all property acquired after marriage by either husband or wife which is not separate property as specified in I.C. § 32-903." *Desfosses v. Desfosses*, 120 Idaho 354, 360, 815 P.2d 1094, 1100 (Ct. App. 1991). The Idaho Court of Appeals held that all earning of either spouse were to be included as community property up until the date of divorce. *Suter v. Suter*, 97 Idaho 461, 546 P.2d 1169 (1976). This includes earnings during any separation. *Id.* A resident non-earning spouse is generally subject to personal income tax in Idaho for her community property interest in wages earned in another state by a non-resident spouse. *Parker v. Idaho State Tax Com'n*, 148 Idaho 842, 230 P.3d 734 (2010). Wages earned by a non-resident spouse in another state are attributable as personal income to the resident spouse. *Id.*

In *Parker* the Court quoted:

> The Supreme Court of the United States has made it clear that a state has the power to tax in relation to a resident's income derived from sources outside the State and that there is nothing in the Federal Constitution to prevent the exercise of such power. The rationale for allowing a state to compute a tax on income earned elsewhere is based on the premise that inhabitants are supplied many services by their state of residence and should contribute toward the support of the state, no matter where their income is earned.

Id., 148 Idaho at 846-47, 230 P.3d at 738-39 (quoting *Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964)).

In the present case Mr. Dunn earned wages in Washington and Texas during the years in question. At no time was Mr. Dunn a resident of Idaho. Petitioner was a resident of Idaho during all relevant years. During that time Mr. Dunn's wages can be properly characterized as the property of the marital community pursuant to Texas, Washington, and Idaho law. As a resident of Idaho Petitioner's interest in Mr. Dunn's wages is attributable to her as income and as such, is taxable by the State of Idaho.

2. The Commerce Clause.

"To show that the Commerce Clause is implicated by a tax statute, [a taxpayer] must demonstrate that the state's taxation of [her] entire income has a substantial effect on an identifiable interstate economic activity or market." *Parker v. Idaho State Tax Comm'n*, 148 Idaho 842, 847, 230 P.3d 734, 739 (2010) (quoting 71 Am.Jur.2d State and Local Taxation § 391 (2009) (citing *Stelzner v. Comm'r of Revenue,* 621 N.W.2d 736, 740 (Minn.2001)).

Petitioner must show that application of Idaho's taxing statute somehow substantially affects interstate commerce for the Commerce Clause to be implicated. *United States* v. *Lopez,* 514 U.S. 549, 559, 115 S.Ct. 1624, 1630 (1995). Commerce is defined as "the commercial intercourse between nations, and parts of nations, in all its branches." *Lopez,* 514 U.S. at 553,

115 S.Ct. 1624 (citation and internal quotation omitted). The purpose of the dormant Commerce Clause is not "to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266, 109 S.Ct. 582 (1989). Rather, "[t]he dormant Commerce Clause protects markets and participants in markets." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300, 117 S.Ct. 811 (1997). Therefore, Petitioner must make an initial showing that Idaho's income tax statute has a substantial effect on an identifiable interstate economic activity or market.

In *Parker* the Petitioner sought judicial review of a tax assessment based on one-half of her husband's Nevada income. *Parker*, 148 Idaho at 847, 230 P.3d at 739. The petitioner argued that Idaho's taxation of her interest in her husband's income violated the Commerce Clause. *Id.* The Idaho Supreme Court held:

> "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 [117 S.Ct. 811, 825, 136 L.Ed.2d 761, 781] (1997). Therefore, the dormant Commerce Clause will not apply unless there is actual or prospective competition between entities in an identifiable market *and* state action that either expressly discriminates against or places an undue burden on interstate commerce. *Tracy*, 519 U.S. at 300 [117 S.Ct. at 825, 136 L.Ed.2d at 780–81]. Furthermore, this impact must be more than merely incidental. *United States v. Lopez*, 514 U.S. 549, 559 [115 S.Ct. 1624, 1630, 131 L.Ed.2d 626, 637–38] (1995). *Stelzner*, 621 N.W.2d at 740–41.
>
> In order to show that the Commerce Clause is implicated in this case, the Parkers would need to show that the State's taxation of Kathy's entire income has a substantial effect on an identifiable interstate economic activity or market. They have failed to identify any interstate economic activity or market that is burdened by the taxation of Kathy's Nevada income. The Commerce Clause is not implicated in this case.

Id., 148 Idaho at 847-48, 230 P.3d at739-40.

Petitioner argues that the recent United States Supreme Court decision in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 191 L.Ed. 2d 813 (2015), stands for the

proposition that a Idaho's personal income tax scheme violates the dormant Commerce Clause because Mr. Dunn's entire income is affected and Mr. Dunn had no contact with the State of Idaho. Petitioner's Reply Brief at 5. Moreover, Petitioner argues a violation because Mr. Dunn's income would be taxed in a state where it was not earned. Petitioner also argues that case law provides that where non-residents are taxed on income earned in New Hampshire, but residents of New Hampshire are not taxed on income earned out of state violated the privileges and immunities clause because of the disparate treatment of residents and non-residents. Petitioner's Reply Brief at 6 (citing *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191 (1975)). Defendant argues that *Parker* is dispositive of the matter in the present case. Defendant's Reply Brief at 11.

Petitioner's reliance on *Wynne* is misplaced. It is true that the Supreme Court held that Maryland's tax scheme violated the internal consistency test. *Wynne*, 135 S.Ct. at 1802-05, 191 L.Ed. 813. However, the reason for the Court's decision was based on Maryland's disparate treatment of non-resident taxation as compared to the tax paid by residents. *Id.* The Court illustrated the disparity showing a non-resident would suffer double taxation under Maryland's taxation scheme while a resident's tax liability would be half that of the non-resident. *Id.* The Court concluded:

> [T]he dormant [c]ommerce [c]lause precludes states from discriminat[ing] between transactions on the basis of some interstate element. . . . This means, among other things, that a [s]tate may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the [s]tate. . . . Nor may a [s]tate impose a tax [that] discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation.

Id. The same facts do not apply here. Petitioner's contention that Mr. Dunn's entire income is affected is not persuasive. Defendant has assessed tax liability only to Petitioner's one-half

interest in wages earned in Texas and Washington. The analysis would be the same if the wages were earned entirely within the State of Idaho, or any other state. It cannot be said that Petitioner is subject to any internal inconsistency, nor is the tax liability disproportionately applied to non-residents as compared to residents. Petitioner realized a one-half interest in the wages of Mr. Dunn pursuant to the community property laws of Texas and Washington and is subject to income tax on that interest in the State of Idaho. Further, Petitioner's interest is the only interest subject to Idaho tax liability. Defendant has not assessed a personal income tax on Mr. Dunn's interest in his earnings. Petitioner has failed to show a substantial effect on an identifiable interstate economic activity or market and Petitioner has not demonstrated how any economic activity or market is burdened by the taxation of Petitioner's interest in income earned in Texas and Washington. Further, there can be no violation of the privileges and immunities clause because Petitioner has not shown disparate treatment between non-resident and resident tax liability. Again, it is not the income attributable to Mr. Dunn that is being taxed; Defendant is taxing only Petitioner's vested one-half interest in Mr. Dunn's wages.

Therefore, the Court determines that *Parker* is dispositive of the current issue. The Commerce Clause is not implicated by Defendant's taxation of Petitioner's one-half interest in the wages earned by Mr. Dunn in Texas and Washington during the years in question.

3. Attorney Fees and Costs.

Idaho Code § 63-3049 reads in pertinent part:

> [w]henever it appears to the court that: (1) proceedings before it have been instituted or maintained by a party primarily for delay; or (2) a party's position in such proceeding is frivolous or groundless; or (3) a party unreasonably failed to pursue available administrative remedies; the court, in its discretion, may require the party which did not prevail to pay to the prevailing party costs, expenses and attorney's fees.

Idaho Code § 63-3049(d). Idaho Code § 12-117 provides for reasonable fees and costs if the court "finds that the nonprevailing party acted without a reasonable basis in fact or law." Idaho Code § 12-117. Further, Idaho Code § 12-121 allows the trial judge to award reasonable fees and costs in a civil action at her discretion. Idaho Code § 12-121.

This Court does not determine that this review was initiated for purposes of delay, nor did Petitioner fail to pursue any administrative remedies. The only basis under Idaho Code § 63-3049 that Respondent may receive fees and costs is if Petitioner's position was frivolous or groundless.

A position is not frivolous merely because it ultimately fails. *Edwards v. Donart*, 116 Idaho 687, 778 P.2d 809 (1989). "The sole question is whether the losing party's position is so plainly fallacious as to be deemed frivolous, unreasonable or without foundation." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 92, 803 P.2d 993, 998 (1991).

The issue presented in the petition for review was not so plainly fallacious as to be determined frivolous or groundless. There is sparse case law dealing with the issue presented by Petitioner and the characterization of property as separate or community is generally controlled by the law of the state where property is acquired. The community property laws of Texas are similar in many ways to the laws of Idaho. However, there is a distinct difference in the manner of characterization of wages earned in Texas as compared to Idaho. This distinction, in large part, provided foundation for Petitioner's argument. It cannot be said that Petitioner's argument lacked foundation or was plainly fallacious. While *Parker* is on point with this Court's decision, in that case there was a stipulation as to what law applied, thus, the *Parker* Court did not address the precise issue addressed here.

The Court determines Petitioner's argument, while ultimately failing, was not devoid of merit. Therefore, Respondent's prayer for reasonable fees and costs pursuant to Idaho Code §§ 60-3049, 12-117, and 12-121 is denied.

III. CONCLUSION

Petitioner had a vested one-half interest in the wages earned by Mr. Dunn during the years in question. During that time Petitioner was domiciled in the State of Idaho. Petitioner is subject to personal income tax in her one-half interest in the wages earned by Mr. Dunn during the relevant years in Washington and Texas. The Commerce Clause is not implicated in the present case because Petitioner has failed to show how Idaho's taxation scheme of Petitioner's entire income has a substantial effect on an identifiable interstate economic activity or market. Further, Petitioner cannot show that Idaho's taxing scheme fails the internal consistency analysis. Petitioner's argument was not frivolous, groundless, or otherwise lacking a reasonable basis in fact or law.

For these reasons, it is hereby

ORDERED that the Commission's Final Decision and Order is AFFIRMED.

DATED this 8th day of June, 2016.

BY THE COURT:

Cynthia K.C. Meyer
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was placed in the courthouse mailing system, postage prepaid, inter office mail, or by facsimile on the 8 day of June, 2016 to:

DAVID B. YOUNG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. Box 36
Boise, ID 83722-0410
Phone: (208) 334-7530
Fax: (208) 334-7844

[ ] U.S. Mail
[ ] Fax

RICHARD W. KOCHANSKY
408 E. Sherman Ave., Ste. 309
COEUR d'ALENE, ID 83814
Fax: (208) 765-3867
rwkochansky@hotmail.com

[ ] U.S. Mail
[ ] Fax
[ ] Email

ROBERT E. KOVACEVICH
818 W. Riverside Ave., No. 525
Spokane, WA 99201
Fax: (509) 625-1914
kovacevichrobert@questoffice.net

[ ] U.S. Mail
[ ] Fax
[ ] Email

BY: _____
Deputy Clerk